HASSAN KADIR & ORS A

v.

MOHAMED MOIDU MOHAMED & ANOR

FEDERAL COURT, PUTRAJAYA B
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CIVIL APPEAL NO: 02()-11-2010(J)]
12 APRIL 2011 C

CONTRACT: *Sale and purchase of land - Specific performance - Plaintiffs purchased land by deed of sale and irrevocable power of attorney - Whether deed of sale an instrument of dealing in respect of alienated land - Whether prohibition in s. 205(3) National Land Code applied to deed of sale - Whether a constructive trust created upon execution of deed of sale - Equity - Registrar's caveat to protect plaintiffs' interests - National Land Code, ss. 5, 205-211* D

LAND LAW: *Sale of land - Specific performance - Plaintiffs purchased land by deed of sale and irrevocable power of attorney - Whether deed of sale an instrument of dealing in respect of alienated land - Whether prohibition in s. 205(3) National Land Code applied to deed of sale - Whether a constructive trust created upon execution of deed of sale - Equity - Registrar's caveat to protect plaintiffs' interests - National Land Code, ss. 5, 205-211* E F

TRUSTS: *Land - Sale - Specific performance - Plaintiffs purchased land by deed of sale and irrevocable power of attorney - Whether deed of sale an instrument of dealing in respect of alienated land - Whether prohibition in s. 205(3) National Land Code applied to deed of sale - Whether a constructive trust created upon execution of deed of sale - Equity - Registrar's caveat to protect plaintiffs' interests - National Land Code, ss. 5, 205-211* G

By a Deed of Sale and Irrevocable Power of Attorney dated H
7 October 1978 ('Deed of Sale'), the plaintiffs purchased from the defendants' father a certain portion ('said portion') of land in Johor Bharu ('said land') and entered into possession of the said portion. The defendants' father then passed away and they obtained a distribution order as beneficiaries of their late father's I
estate for the said land, including the said portion, to be transmitted to them. The plaintiffs, upon the defendants' refusal to transfer the said portion to them, lodged a private caveat on the

said land. However, their application to the Johor Bharu Land Administrator for variation of the distribution order was rejected. The plaintiffs then applied to the High Court for, *inter alia*, specific performance of the Deed of Sale. The High Court judge found that a valid and binding agreement existed between the parties and that the defendants held the said portion as a constructive trustee for the plaintiffs. The defendants' subsequent appeal to the Court of Appeal was dismissed, resulting in the present appeal in which the following question (divided into two parts) was posed: (i) whether the Deed of Sale executed prior to the commencement of s. 205 of the National Land Code ('Code') was an instrument of dealing in respect of alienated land, within the provisions of s. 205 of the Code read with s. 5 and ss. 206 to 211 thereof; and (ii) if the answer to (i) was in the negative, whether the prohibition in s. 205(3) of the Code applied to the Deed of Sale.

Held (dismissing the appeal with costs)
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) Under s. 205(1) of the Code, a "dealing" that is capable of being effected under the Code in respect of alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen of the Code, and no others. Thus, the term "dealing" refers to transactions in land where the provision of the Code has been observed as to form and the necessary stamp duty has been paid, followed by registration thereof on the register. In practice, a caveat may be entered to protect the purchaser's interest before the registration is effected. By contrast, a contract or deed of sale of land is a transaction entered into without complying with the Code's requirements both in respect of substance and form. The contract or deed is not in any way regulated by the Code but the interest arising under either one may be protected by way of a private caveat entered into under s. 324(2) of the Code. Premised on the above, the Deed of Sale in the present case did not fall within the meaning of the word "dealing" as defined in s. 5 of the Code, and it was also not an "instrument of dealing" within the provision of s. 205 of the Code read together with ss. 206 to 211 thereof. The first part of the question should thus be answered in the negative and it necessarily followed that the prohibition in s. 205(3) of the Code did not apply to the Deed of Sale (the answer to the second part of the question). (paras 17 & 18)

(2) The courts below were correct in finding that a constructive trust came into existence upon the execution of the Deed of Sale. This was in line with the common law principle that the Deed of Sale would entitle the plaintiff to specific performance and this in turn activated the equitable principle that equity looks upon as done that which ought to have been done. The defendants must hold the said portion subject to the constructive trust in favour of the plaintiffs pursuant to the terms of the Deed of Sale. (paras 27 & 28)

(3) Since a private caveat would not be appropriate in the instant case because of its limited lifespan, the better alternative was for the court to direct the Registrar of Titles to enter a registrar's caveat against the said land to protect the plaintiffs' interests as beneficiaries under the constructive trust. (para 30)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Melalui suatu Surat Ikatan Jualan dan Surat Kuasa Wakil yang tidak dapat dibatalkan bertarikh 7 Oktober 1978 ('Surat Ikatan Jualan'), plaintif-plaintif membeli dari ayah defendan-defendan sebahagian ('bahagian tersebut') tanah di Johor Bharu ('tanah tersebut') dan mengambil milikan bahagian tersebut. Ayah defendan-defendan kemudiannya meninggal dunia dan mereka memperolehi perintah pembahagian sebagai benefisiari estet ayah mereka bagi tanah tersebut, termasuk bahagian tersebut, untuk diberikan kepada mereka. Plaintif-plaintif, bila defendan-defendan enggan memindah bahagian tersebut kepada mereka, memasukkan kaveat persendirian atas tanah tersebut. Walau bagaimanapun, permohonan mereka ke Pentadbir Tanah Johor Bharu bagi variasi perintah pembahagian telah ditolak. Plaintif selepas itu memohon ke Mahkamah Tinggi untuk, antara lain, pelaksanaan spesifik Surat Ikatan Jualan. Hakim Mahkamah Tinggi mendapati bahawa suatu perjanjian yang sah dan mengikat wujud di antara pihak-pihak dan bahawa defendan-defendan memegang bahagian tersebut sebagai pemegang amanah konstruktif bagi plaintif-plaintif. Rayuan kemudiannya defendan-defendan ke Mahkamah Rayuan telah ditolak, mengakibatkan rayuan semasa di mana soalan berikut (dibahagikan kepada dua cabang) telah dikemukakan: (i) sama ada Surat Ikatan Jualan yang dilaksanakan sebelum s. 205 Kanun Tanah Negara ('KTN') mula berkuatkuasa adalah suatu suratcara

urusniaga berkenaan dengan tanah beri milik, yang termasuk peruntukan-peruntukan s. 205 Kanun dibaca bersama-sama dengan s. 5 dan ss. 206 ke 211; dan (ii) jika jawapan kepada (i) berbentuk negatif, sama ada larangan dalam s. 205(3) Kanun terpakai kepada Surat Ikatan Jualan.

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Di bawah s. 205(1) Kanun, suatu "urusniaga" yang boleh dilaksanakan di bawah Kanun berhubungan dengan tanah beri milik dan kepentingan-kepentingan dalamnya seharusnya seperti yang dinyatakan dalam Bahagian-bahagian Empat Belas ke Tujuh Belas Kanun, dan tiada lain. Oleh itu, terma "urusniaga" merujuk kepada transaksi-transaksi dalam tanah di mana peruntukan Kanun telah dipatuhi berkenaan bentuknya dan duti setem yang perlu telah dibayar, diikuti dengan pendaftarannya dalam buku pendaftaran. Pada praktiknya, suatu kaveat boleh dimasukkan untuk melindungi kepentingan pembeli sebelum pendaftaran itu dilaksanakan. Sebaliknya, suatu kontrak atau surat ikatan jualan tanah adalah transaksi yang ditandatangani tanpa mematuhi keperluan-keperluan Kanun dalam kedua-dua substans dan bentuk. Kontrak atau surat ikatan itu tidak dalam apa-apa cara dikawali oleh Kanun tetapi kepentingan yang bangkit di bawah mana-mana satu boleh dilindungi melalui kaveat persendirian yang dimasukkan di bawah s. 324(2) Kanun. Berdasarkan di atas, Surat Ikatan Jualan dalam kes semasa tidak termasuk di dalam maksud perkataan "urusniaga" seperti yang dijelaskan dalam s. 5 Kanun, dan ia juga bukan suatu "suratcara urusniaga" yang termasuk dalam peruntukan s. 205 Kanun dibaca bersama-sama dengan ss. 206 ke 211. Bahagian pertama soalan oleh itu sepatutnya dijawab secara negatif dan ini bermaksud bahawa larangan dalam s. 205(3) Kanun tidak terpakai kepada Surat Ikatan Jualan (jawapan kepada bahagian kedua soalan).

(2) Mahkamah-mahkamah bawahan adalah betul dalam mendapati bahawa suatu amanah konstruktif diwujudkan atas pelaksanaan Surat Ikatan Jualan. Ini selaras dengan prinsip common law bahawa Surat Ikatan Jualan akan memberi plaintif hak mendapat pelaksanaan spesifik dan ini seterusnya mengaktifkan prinsip berekuiti bahawa ekuiti memandangkan seperti dilaksanakan apa yang seharusnya dilaksanakan. Defendan-

defendan mesti memegang bahagian tersebut tertakluk kepada amanah konstruktif atas nama plaintif-plaintif mengikut terma-terma Surat Ikatan Jualan.

(3) Oleh kerana suatu kaveat persendirian tidak sesuai dalam kes semasa disebabkan jangka hayatnya yang terhad, alternatif yang lebih baik adalah bagi mahkamah untuk mengarahkan Pendaftar Hakmilik memasuki kaveat pendaftar terhadap tanah tersebut untuk melindungi kepentingan-kepentingan plaintif sebagai benefisiari-benefisiari di bawah amanah konstruktif tersebut.

[Diperintah sedemikian.]

Case(s) referred to:

Attorney General for Hong Kong v. Reid [1994] 1 AC 324 ***(refd)***
Beatty v. Guggenheim Exploration Co 225 NY 380 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co (No 2) [1969] 2 Ch 276 ***(refd)***
Kersah La'usin v. Sikin Manan [1964] 1 LNS 57 HC ***(refd)***
Letchumanan v. Eng Mee Yong & Ors [1976] 1 LNS 59 HC ***(refd)***
Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***
Miller v. Minister of Mines [1963] AC 484 ***(refd)***
Munah v. Fatimah [1967] 1 LNS 108 HC ***(refd)***
Sditam Saad v. Chik Abdullah [1973] 1 LNS 134 HC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***
United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors [1975] 1 LNS 187 FC ***(refd)***
Walsh v. Lonsdale [1882] 21 Ch D 9 ***(refd)***
Yeoman's Row Management Ltd & Anor v. Cobbe [2008] UKHL 55 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3
National Land Code, ss. 5, 136, 205(1), (3), 206, 207, 208, 209, 210, 211, 324(2), 417

For the appellants - Dr Wong Kim Fatt (Mathews George with him); M/s Mathews George & Co
For the respondents - Robert Lai Poh Fye (Fadzilah Mansor with him); M/s Jackson & Masacorale

[Appeal from Court of Appeal; Civil Appeal No: J-02-729-2002]

[Editor's note: For the Court of Appeal judgment, please see Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 152.]

Reported by Suresh Nathan

A

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

B **[1]** This is an appeal by the appellants against the decision of the Court of Appeal dated 1 September 2009 dismissing the appellants' appeal. Leave to appeal was granted by this court on 19 July 2010 on the following question:

C > Whether the Deed of Sale and Irrevocable Power of Attorney, executed prior to the commencement of section 205 of the National Land Code 1965, is an instrument of dealing in respect of an alienated land, within the provisions of section 205, of the National Land Code 1965, read with sections 5 and 206 to 211 thereof; and if it is not an instrument of dealing, whether the
D > prohibition in section 205 (3) applies to the Deed of Sale and Irrevocable Power of Attorney.

In this judgment, the respondents will be referred to as the plaintiffs and the appellants as the defendants as in the trial court.

E

The Facts

[2] The facts relevant to this appeal are briefly as follows:

> By the deed of sale and Irrevocable Power of Attorney dated
F > 7 October 1978 ("the Deed of Sale"), the plaintiffs purchased from the defendants' late father ("the deceased") 21,000 square feet ("the said portion") in the land comprised in GM 482 (previously known as EMR 381) Lot 261, Mukim Plentong, Daerah Johor Bharu, Negeri Johor ("the said land"). The said land is subject to the category "agriculture". The plaintiffs paid
G > the full purchase price of RM42,000.00 and entered into possession of the said portion of the land.

[3] The deceased passed away on 17 November 1978. The defendants then obtained a distribution order as beneficiaries of
H their late father's estate, where the said land, including the said portion, was transmitted to the defendants as registered proprietors in equal shares.

[4] The plaintiffs then requested the defendants to transfer the said portion to them but the defendants refused.

I

[5] The plaintiffs then lodged a private caveat on the said land. The plaintiffs' application to the Johor Bahru Land Administrator to vary the distribution order was rejected.

The High Court

[6] The plaintiffs filed an originating summons in the Johor Bharu High Court against the defendants but withdrew it with liberty to file afresh.

[7] Subsequently, the plaintiffs filed a writ of summons against the defendants praying for, *inter alia*:

(a) Specific performance of the Deed;

(b) Transfer of said portion of the subject land to the plaintiffs pursuant to the said Deed and for the plaintiffs to be made co-owners of the subject land;

(c) Alternatively, a declaration that the plaintiffs are entitled to the said land portion under the Deed and the defendants as trustees transfer the same to the plaintiffs and be made registered co-owners of the land, failing which the Senior Assistant Registrar shall execute the transfer of the said portion to the plaintiffs and that the Registrar of Titles be directed to register the same in favour of the plaintiffs;

(d) Such further relief that the High Court deems fit and equitable in the circumstances of the case; and

(e) Costs.

[8] At the end of the trial, the learned trial judge found for the plaintiffs and made the following orders:

(a) That the defendants do hold the subject land comprised in GM 482 (previously known as EMR 381) Lot 261 Mukim Pletong, Daerah Johor Bharu, Negeri Johor subject to the constructive trust created in favour of the plaintiffs to the extent of 21,000 square feet thereof pursuant to the Deed of Sale and Irrevocable Power of Attorney dated 7 October 1978;

(b) That pursuant to s. 417 of the NLC, the Registrar of Titles or the Land Administrator, as the case may be, do cause an endorsement to be entered on the register document of title of the trust aforesaid in favour of the plaintiffs herein.

[9] In relation to the issue of whether there is a binding agreement upon the terms of the Deed of Sale, the learned trial judge in his judgment held:

A Upon a careful analysis of the terms of the agreement as expressed therein I have no hesitation in concluding that it was an out and out agreement for sale of the Portion. The recitals in the preamble identifies the land, the portion and the sale consideration of RM42,000.00. The Deed of Sale then goes on to expressly state that "in consideration of the sum of RM42,000.00 (Dollars Forty Two Thousand) only the receipt whereof the Vendor hereby acknowledges in full being the agreed purchase price of the aforesaid premises, the vendor do hereby transfer, assign and convey all his rights, title and interest in the said portion of the property free from all encumbrances TO HOLD the same unto the Purchasers absolutely.

[10] As to the question whether the Deed of Sale was unenforceable and illegal being in contravention of s. 205 and s. 136 of the National Land Code 1965 ("the Code"), the learned judge held:

D It is my judgment that the sum total of the prohibitory provisions of section 205(3) and 205(4) would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land herein which is E categorized as agricultural land. This brings me to the question as to what is the effect of the prohibitory provision of section 205 of the National Land Code on the Deed of Sale – does it mean that the statutory bar in getting themselves registered as co-proprietors would leave the plaintiffs herein without any remedy F whatsoever? Does the rigours of Section 205 National Land Code prevent this Court from giving effect and preserving the equitable interest of the plaintiffs? In my judgment the interest of justice dictates that the Court should and must come to the aid of the plaintiffs herein more so in the light of the findings of the equitable interests by way of trusts created and subsisting under the Deed G of Sale.

The Court Of Appeal

[11] On appeal, the Court of Appeal narrowed down the issue in the appeal to this:

H Does s. 205(3) of the National Land Code 1965, read with s. 205(4) and s. 205(5), prohibit the High Court from making the above orders?

[12] At the end of the hearing of the appeal, the Court of Appeal I dismissed the defendants' appeal with costs. The underlying reasons for their decision are found in the following passage of their judgment:

The amendment in s. 205(3) was inserted *vide* s. 77 of Act A587/1984 to prohibit the holding of agricultural land by co-owners where the area of the individual portions is less than two-fifths of a hectare: See National Land Code – *A Commentary by Judith Sihombing* p. 379 (1992). However, as alluded to above, s. 205(3) is to be read subject to sub-section (4) and (5). The amendment in s. 205(5) was effected by s. 24 of Act A625 (sic)/1985 which came into force on 25 March 1985. The Deed in the instant appeal was executed on 7 October 1978, some six seven years before the enactment s. 205(3) as modified by s. 205(5). It is therefore axiomatic that s. 205(3) is inapplicable. Instead, s. 205(5) prevails and the Deed is not rendered invalid by s. 205(3). The effect of introducing s. 205(5) is to preclude the retrospective effect of s. 205(3) on certain instruments. In the circumstances of this appeal, s. 205(5) prevails. Hence the Deed is not rendered invalid by s. 205(3).

This Court

[13] This court had on 19 July 2010 granted leave to the defendants to appeal against the decision of the Court of Appeal on the question of law set out earlier.

The Question

[14] The question posed to us may be divided into two parts namely:

(i) Whether the Deed of Sale executed prior to commencement of s. 205 of the Code (as amended) is an instrument of dealing within the meaning of s. 205 read with s. 5 and ss. 206 to 211 of the Code?

(ii) If the answer to (i) is in the negative, whether the prohibition in s. 205(3) applied to the Deed of Sale?

[15] For ease of reference, the relevant part of the s. 205 of the Code is reproduced below:

205. Dealings capable of being effected, and persons capable of taking thereunder.

(1) The dealings capable of being affected under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.

(2) The persons and bodies in whose favour such dealings are capable of being effected shall be those, to whom, under section 43, State land is capable of being alienated.

(3) Subject to sub-section (4), no dealing in respect of any alienated land subject to the category "agriculture" or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

(4) The prohibition imposed by sub-section (3) shall not apply to those cases where upon the coming into force of the said subsection, any alienated land or held by any person or body, is less than two-fifths of a hectare, or an undivided share in any alienated land held by any person or body represents a portion of less than two-fifths of a hectare, and dealings shall be capable of being effected in respect of such alienated land or undivided share therein:

Provided that –

(i) any such dealing shall be in respect of the whole of the alienated land and shall be in favour of only one person or body; or

(ii) any such dealing shall be in respect of the whole of any undivided share in any alienated land and shall be in favour of only one person or body, or one or more co-proprietors of the said land.

(5) Nothing contained in sub-section (3) and (4) shall render invalid any instrument effecting any dealing in any alienated land or any undivided share therein executed under this part before the commencement of this section.

[16] A dealing is defined in s. 5 of the Code as follows:

5. Interpretation.

"dealing" means any transaction with respect to alienated ;and effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;

[17] Under s. 205(1) of the Code, "dealing" that is capable of being effected under the Code in respect of alienated lands and interest therein shall be those specified in Part Fourteen to Seventeen of the Code, and no others. Thus, the term "dealing" refers to transaction in land where the provision of the Code has been observed as to form and the necessary stamp duty has been paid, and followed by registration thereof on the register. In

practice, to protect the interest of the purchaser, before the registration is effected, a caveat may be entered. (See *Miller v. Minister of Mines* [1963] AC 484; *United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors* [1975] 1 LNS 187; *Letchumanan v. Eng Mee Yong & Ors* [1976] 1 LNS 59 and *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67). A B

[18] By contrast, a contract or deed of sale of land is a transaction entered into without compliance with the requirements of the Code both in respect of substance and form. The contract or deed is not in any way regulated by the Code. But, the interest arising under the contract or deed may be protected by way of private caveat entered into under s. 324(2) of the Code. Premised on the above, I am of the view that the deed of sale in the present case does not fall within the meaning of the word "dealing" as defined in s. 5 of the Code. And it is not "an instrument of dealing" within the provision of s. 205 of the Code read together with ss. 206 to 211 thereof. I would, therefore, answer the first part of the question in the negative. Since our answer to the first part of the question is in the negative, then it necessarily follows that the prohibition in s. 205(3) of the Code does not apply to the deed of sale. That is our answer to the second part of the question. C D E

[19] That is not, however, the end of the matter. There is one other issue, that is, whether the order made by the courts below is correct and appropriate in the light of the circumstances obtaining in this case. F

[20] The deed of sale in the present case was entered into by the deceased and the plaintiffs in 1978. Clause 2 of the agreement provides that the purchasers, upon payment of the stipulated sum, shall have possession and occupation of the property and shall be at liberty to the use of the same, in any manner they choose and deem fit, and to execute all rights of exclusive ownership of the said portion of the property. And under cl. 3, the vendor is to surrender to the purchaser the said portion forthwith. G H

[21] Pursuant to the deed of sale, the plaintiffs entered into occupation of the land and had been in occupation until today. But no transfer was effected in respect of the said portion. In other words, the plaintiffs were never registered as co-proprietors of the said land. I

[22] By this writ, plaintiffs applied for specific performance of the said deed of sale. The learned High Court Judge, having considered the evidence before him came to a finding that there was in fact a valid and binding agreement between the plaintiffs and the deceased. And since the plaintiffs had been in possession of the said portion, they did not lose their right by not proceeding at once for specific performance. The learned judge relied on *Kersah La'usin v. Sikin Manan* [1964] 1 LNS 57; *Sditam binti Saad v. Chik binti Abdullah* [1973] 1 LNS 134; *Munah v. Fatimah* [1967] 1 LNS 108 in support of his decision.

[23] The learned judge further held that the plaintiffs pursuant to the deed of sale had acquired rights *ad rem* over the said portion pending registration of the said portion by the vendor and by devolution, the defendants hold the said portion as constructive trustee for the plaintiffs.

[24] It is trite that the modified form of the Torren System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in land whether under "express trust", "constructive trust" or "resulting trust" arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of the s. 3 of the Civil Law Act 1956. And as was said by Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44:

> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust… . Prior to the registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as constructive trustee.

This case was cited by the learned judge in his judgment.

[25] The concept of constructive trust was applied by the Federal Court in the recent case of *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419. In that case, Gopal Sri Ram quoted from the speech of Lord Scott of Foscote in *Yeoman's Row Management Ltd & Anor v. Cobbe* [2008] UKHL 55, as to what is meant by constructive trust, which reads:

> It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognize particular factual circumstances that will do so and also to recognize other factual circumstances that will not. A particular situation where a constructive trust has been held to have been created arises out of joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of joint venture, and one of the joint ventures, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisitions in his own name but subsequently seeks to retain the land for his own purpose, the court will regard him as holding the land on trust for the joint ventures. This would be either an implied trust of a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint ventures have not agreed and cannot agree about what is to be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of the sale divided equally between the joint ventures.

[26] In *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175, Ong Hock Sim FJ, in delivering the judgment of the court, cited with approval a number of leading English authorities on the concept of bare trust which are relevant for the present purpose:

> As was said by Jessel M.R. in *Lysaght v. Edwards* [1876] 2 Ch D 499 at p 506:
>
> > … the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.
>
> I would quote first the head note to *Williams v. Greatrex* [1957] 1 WLR 31 at p 36:

A Held, (3) That the purchaser, having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

Denning LJ said in that case:

If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.

In a concurring judgment Hodson LJ (as he then was) cited with approval Cotton LJ in *Mills v. Haywood* [1877] 6 Ch D 196 202-3 where his Lordship said:

In such a case, as, eg, where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right.

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[27] Based on the foregoing, I agree with the courts below that in the present case, constructive trust came into existence upon the execution of the deed of sale. This is in line with the common law principle that the deed of sale would entitle the plaintiff to specific performance and this in turn activates the equitable principle that equity looks upon as done that which ought to have been done (See *Walsh v. Lonsdale* [1882] 21 Ch D 9, *Attorney General for Hong Kong v. Reid* [1994] 1 AC 324).

If I may add, by definition we may say that constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. (See Edmund Davies LJ in *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)* [1969] 2 Ch. 276 at 301).

In *Beatty v. Guggenheim Exploration Co.* 225 NY 380 at 389 (1919) it was observed that, "A constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." per Cardozo J.

[28] Having considered the facts in this present case and based on the authorities cited above, I am in agreement with the courts below that equity dictates that the defendants must hold the said portion subject to the constructive trust in favour of the plaintiffs pursuant to the term of the deed of sale.

[29] The next issue to be considered is whether the court could properly, within the provisions of the Code, direct the Registrar of Titles and/or Land Administrator to cause an endorsement to be entered on the Register of Titles of the constructive trust in favour of the plaintiffs. The courts below did not specify under what provision of the Code the endorsement was to be effected.

[30] Under the Code, there is no provision for the registration of the constructive trust as such. Normally, if the beneficiary of a constructive trust wishes to protect his interest, he may do so by entering a private caveat against the land. But, in this case, a private caveat would not be appropriate because of its limited lifespan. The other alternative is for the court to direct the Registrar of Titles to enter the Registrar's Caveat against the said land to protect the interest of the plaintiffs as beneficiaries under the constructive trust. That I think is the more appropriate order to be made in the present case. Accordingly I would direct that the Registrar's Caveat be entered against the said land to the effect that the defendants, as registered proprietors, hold 21000/84398 undivided shares in the said land as constructive trustees for the plaintiffs, their successors in title or assigns.

A

Conclusion

[31] In the result I would dismiss this appeal with costs. The order of the High Court as affirmed by the Court of Appeal is, however, varied to the extent indicated above.

B

[32] My learned brothers Zulkefli Ahmad Makinudin and James Foong Cheng Yuen (FCJJ) have read this judgment in draft and have expressed their agreement to the same.

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